84-486

Office-Supreme Court, U.S.
FILED
SEP 24 1984
ALEXANDER L. STEVAS,
CLERK

No. .....

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

SHEARSON/AMERICAN EXPRESS INC. and JASON ALBERTSON,
*Petitioners,*

vs.

CHARLES E. NEELY and JO MARIE DIMAGGIO,
*Respondents.*

## PETITION FOR CERTIORARI

MICHAEL M. GLESS
ROBERT D. FEIGHNER
KEESAL, YOUNG & LOGAN
A Profession Corporation
Pier F — Berth 203
Post Office Box 1730
Long Beach, California 90801
(213) 436-9051

*Attorneys for Shearson/American Express Inc. and Jason Albertson*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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## QUESTIONS PRESENTED

A. Should a brokerage house be responsible to a customer for that portion of the customer's damages which is attributable only to adverse market forces, rather than any act or omission by the brokerage house?

B. May a punitive damage award which is based upon an inflated compensatory award (which fails to recognize actual market forces) be upheld?

C. Was the award of punitive damages in a ratio of ten times compensatory damages excessive as a matter of law in a business tort case?

## THE PARTIES

The parties to this action are Petitioners, SHEARSON/ AMERICAN EXPRESS INC. ("Shearson") and JASON ALBERTSON ("Albertson"), and Respondents, CHARLES E. NEELY and JoMARIE DiMAGGIO, husband and wife (collectively "Neely" or the "Neelys").

For the Court's information, Shearson has, since the inception of this litigation, acquired the entity formerly known as Lehman Brothers Kuhn Loeb, Inc., and is now known as Shearson Lehman/American Express Inc.

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## PETITION FOR CERTIORARI

### I.

### OFFICIAL AND UNOFFICIAL REPORTS.

There are no reported opinions arising out of this litigation. Although the United States Court of Appeals for the Ninth Circuit did issue a memorandum opinion, filed on July 11, 1984, which discusses the issues raised in this petition, the court ordered that their memorandum opinion not be published in the Federal Reporter. A copy of that opinion is attached to the Appendix, labeled Exhibit "1," and incorporated herein by this reference.

## II.

## BASIS FOR SUPREME COURT JURISDICTION.

This petition arises from a decision of the United States Court of Appeals for the Ninth Circuit. That decision was filed and entered on July 11, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2101(c) and Rule 20.2 of the Rules of the Supreme Court.

## III.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

The resolution of the questions presented in this Petition does not involve a consideration of any constitutional provisions, treaties, statutes, ordinances or regulations. All questions involve the calculation of damages on a securities claim.

One statute will be referenced, however, in discussing the judicial calculation of damages. 15 U.S.C. § 78bb of the Securities Exchange Act of 1934 provides in pertinent part as follows:

> (a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or office or performing like functions) or any State over any security or any person insofar as it does not conflict with the provisions of this chapter of the rules and regulations thereunder.

## IV.

## STATEMENT OF THE CASE.

### A. Procedural History.

The complaint was filed in this action by the Neelys on May 25, 1982. That complaint sought damages against their former stock broker, Shearson, and their account executive, Albertson, alleging violations of the Securities Exchange Act of 1934, breach of fiduciary duty and negligence in the handling of their stock portfolio. In particular, plaintiffs alleged that the trades made in their account were unsuitable for them, that the account was excessively traded and that any loss in the portfolio would be limited to five percent of the original portfolio.

Jurisdiction in the district court was based upon 28 U.S.C. § 1331 (federal question) and § 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa).

The matter was tried before a jury in the United States District Court in Phoenix, Arizona, before the Honorable Carl Muecke, commencing on June 21, 1983. At the conclusion of trial, the jury awarded compensatory damages against both defendants in the sum of $21,959, representing the total loss on the account on both the admittedly suitable as well as unsuitable stocks. In addition, punitive damages were awarded against Shearson in the sum of $100,000 and against Albertson in the sum of $10,000. (A copy of the judgment entered by the trial court is attached to the Appendix, labeled Exhibit "2," and incorporated by this reference).

Following the entry of judgment in the trial court below, as well as defendants' motion for a new trial and for a remittitur, defendants filed a notice of appeal with the district court in September 1, 1983. Following briefing and oral argument, the Court of Appeals affirmed the

judgment of the district court in a written opinion filed on July 11, 1984. (This opinion has previously been incorporated as Exhibit "1" to the Appendix.)

This Petition for Writ of Certiorari arises out of the affirmance of the trial court's judgment by the Court of Appeals.

**B. Statement of Facts.**

The Neelys opened an account with the Lancaster, California office of Shearson on March 2, 1981. They delivered to Shearson and Mr. Albertson cash of $10,000 along with their existing portfolio consisting of ten stocks valued at $63,000 on which they were earning income of only two to three per cent per year. These stocks had been inherited by Mrs. Neely from her father in 1977.

Although each plaintiff holds a bachelor's and master's degree, they had limited stock market experience prior to March 1981. Mr. Neely was employed as a real estate salesman and Mrs. Neely was unemployed having recently left her position as an equal employment opportunity officer at NASA. Plaintiffs advised Mr. Albertson that they had an annual income of $32,000 per year and a net worth of approximately $160,000. They stated that their investment objectives were income and growth combined with both safety and risk.

Prior to any trades being made in the account, Mr. Albertson reviewed with the Neelys various investment alternatives available to them, including options, annuities, and various stocks he had previously researched. Mr. Albertson's handwritten notes of these recommendations were prepared during the initial conference with the Neelys and were received in evidence at trial. On or about March 30, 1981, Shearson mailed to the Neelys a letter confirming the information they had given to Mr. Albertson on their assets

and investment objectives, advising them of the risk of loss in the securities market and requesting the Neelys to contact Shearson directly if any of the information furnished by Mr. Albertson was inaccurate. The Neelys admitted they received it, read it, and made no objections to Shearson or Mr. Albertson of any inaccuracies. Since Mrs. Neely was partially blind, she acknowledged that her husband read and then advised her of the contents of the new account papers they were given by Shearson to sign.

Mrs. Neely relied on her husband to advise her what was disclosed in each document and on the monthly statements. One of the documents which the Neelys signed and delivered to Shearson was a Discretionary Authorization agreement which authorized Mr. Albertson to select securities and options which he felt appropriate for the account without prior consultation with the Neelys. The Neelys also sent Mr. Albertson a letter requesting that he assume personal discretion over the account.

Shortly after the Neelys opened their account, they delivered to Mr. Albertson a handwritten "Letter of Instructions" dated March 25, 1981 setting forth seven requests in the handling of their account. Mrs. Neely admitted that all their requests were met except one which requested $400 per month income. She understood this request could not be met because the Neelys made large cash withdrawals from their account. The Neelys also testified that Albertson stated he would not churn their account like a drunken sailor.

During the first sixty days the account was open, Mr. Albertson liquidated the bulk of the original portfolio deposited by the Neelys. The Neelys originally alleged that both the liquidation of the original portfolio and the subsequent purchase of other stocks and options were unsuitable for them. The Neelys' expert witness, Eugene Tom-

pane, testified however that, in his expert opinion, Mr. Albertson's liquidation of the original portfolio was totally suitable and was in the Neelys' best interest since the stocks therein were not consistent with the Neelys' investment objectives. The stocks in the original portfolio were also declining in value at that time. The Neelys admitted they never complained about the liquidation of the original portfolio.

Within a few days of every purchase and sale made in the account, the Neelys received and acknowledged that they understood the written confirmation slips advising them of the trade, the price received or due, and the commission earned. Each month they received a statement summarizing the trades in the account as well as the changing equity value in their account. Plaintiffs acknowledge reading each of these documents and making no complaint regarding any of the trades or the performance of the account. Each month Mr. Neely stated that he reviewed the statements and in his own handwriting verified on the face of the statements the market value and equity of each stock in the portfolio.

With the proceeds from the liquidation of the original portfolio, Mr. Albertson purchased thirteen new stocks and wrote options on six of the stocks. Mr. Tompane, plaintiffs' expert, testified that in his expert opinion all of these new stocks were both suitable for the Neelys and appropriate for their account, except the following five stocks: Diagnostic Data, Sargent Industries, Immutron, Scott Industries, and Del Webb Corp. These five stocks lost $11,706 including commissions.

Mr. Tompane further testified that the strategy used by Mr. Albertson on the option trades was the most conservative strategy in the field of options and that all companies were suitable on which to write options. Mr. Albertson

testified that he was thoroughly familiar with each of the five stocks in question and had in addition purchased these five stocks for his own personal account. The Albertsons also suffered losses in the same five stocks. During the time the Neelys were investing at Shearson, the stock market declined twelve percent due primarily to the unprecedented rise in interest rates. Both Mr. and Mrs. Neely admitted being aware that the stock market was dropping in 1981 based on news reports they had heard or received.

In both June and September 1981, Shearson delivered to the Neelys an Asset Review Sheet summarizing the performance in their portfolio. This sheet was a supplement to the monthly statements and provided additional information to keep customers fully informed of the status of their accounts. The Asset Review Sheet disclosed, among other things, each stock and option in the account, its value, yield, income earned, Standard & Poor rating, and the account's equity.

The entire portfolio had a value on June 29, 1981 of $55,296. Mr. Neely acknowledged that he was aware that he opened his account in March, 1981, with a value of $74,000, that he had withdrawn cash from the account as of June 29 in the sum of $10,000 and that if there had been no decline in the market value he should have an account worth approximately $64,000 as of June 29. Despite the $9,000 paper loss in the account Mr. Neely made no complaint about the account's performance in either June or September of 1981.

Mr. Neely acknowledged that he never advised anyone at Shearson of Mr. Albertson's "5% maximum loss" representation until their complaint was filed in 1981. Plaintiffs also admitted they were aware they had the right to close their account or change their broker any time they were unhappy with the account's performance. The Neelys were aware

there was a risk of loss in buying stocks and that this was not a guaranteed investment. However, they felt the risk was minimal similar to owning stocks such as Boeing or General Dynamics.

The Neely's evidence on the alleged excessive trading in the account also came from Mr. Tompane, their expert witness. However, Mr. Tompane acknowledged that the annual turnover ratio using the Looper formula was only 3.03. Mr. Philip deRoulet, defendants' expert, testified that the Looper formula had been discredited by the Securities & Exchange Commission since it exaggerated the turnover rate. Further, under the decision in *Rolf v. Blyth Eastman Dillon*, 424 F. Supp. 1021 (1977), activity is generally not considered excessive even under the Looper formula until a turnover of 6.0 is reached.

On December 10, 1981, the Neelys requested that all of their cash and securities be sent to them since they were now residents of Arizona. The final securities were delivered out of the account in March, 1982.

## V.

## ARGUMENT.

### A. The Trial Court Erred in Awarding Damages to Plaintiffs Which Do Not Take Into Consideration the Effect of Actual Market Forces and Which Grant to Plaintiffs a Sum of Damages Which Exceeds the Amount They Would Have Received Had They Made No Trades Whatsoever at Shearson.

A hearing from this court is necessary to resolve the present controversy between the various jurisdictions as to whether or not market forces should be considered in calculating and awarding damages. Shearson cites authorities from the Fifth Circuit (*Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981)), Second Circuit (*Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2nd Cir. 1978)) and various SEC decisions as support for its position that damages, as presently awarded, are inflated as failing to recognize market forces. Plaintiffs cite the California case of *Twomey v. Mitchum, Jones & Templeton, Incorporated*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968), as well as SEC opinions in support of their position that no reduction can be given for losses caused by market forces. The Court of Appeals, almost without discussion ruled in plaintiffs' favor on the issue, though strangely citing *Miley v. Oppenheimer & Co., supra*, which is supportive of Shearson's position. (See especially 637 F.2d at 327-328.)

A ruling from this Court is necessary to resolve the confusion and ambiguity which now exists as to whether market forces should be considered in the calculation of damages in a securities account. In addition, review by this Court is necessary and proper in order to obtain a final ruling on this federal question which continues to acquire increasing significance.

Prior to the commencement of the trial, plaintiffs' counsel made a motion in limine to exclude evidence on the performance of the Neelys' original portfolio if no trading had ever been done. Defendant filed written objections thereto and sought to demonstrate that the Neelys' original account would have declined, due to general market conditions, by an amount in excess of $22,000 if no trading had taken place. This normal market decline was in excess of what actually happened to plaintiffs' portfolio as a result of the trades by the defendants. The matter was argued in chambers and also in court following which the plaintiffs' motion to exclude evidence was granted.

Defendants, based on the authorities hereinafter cited, contended that evidence on this subject was a crucial part of their defense for the following reasons:

1. The evidence would rebut plaintiffs' claims that it was inappropriate or unsuitable to sell the original portfolio or that defendants were negligent in advising the sale.

2. The evidence would rebut plaintiffs' claim that they suffered damages as a result of the liquidation.

3. The evidence would demonstrate that the Neelys' original account was declining at a rate in excess of the general market decline.

4. The evidence would show that had no mishandling of the portfolio occurred, the account would have declined by that percentage anyway (*Rolf v. Blyth Eastman Dillon, infra*).

In the case of *Twomey v. Mitchum, Jones & Templeton*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968), the court permitted testimony as to what might have happened to the plaintiff's original portfolio during the time the plain-

tiff maintained an account at the brokerage firm. At page 251 (note 37) the court stated:

> The evidence reflects that it [plaintiff's original account] would have enhanced in value if it had been retained in the form in which it was held by plaintiff at the time the defendants took over the account. There is no evidence to show that an otherwise properly managed account for a customer of the nature of plaintiff would have ultimately depreciated in value over the period involved. There is no evidence to show that they are other than what would have been yielded by a properly selected and managed account.

In the case of *R. H. Johnson & Company,* 33 SEC 180, the Securities & Exchange Commission was called upon to review the facts of an alleged churning case involving the account of an elderly widow and her daughter. In analyzing the trades, the court permitted testimony regarding what would have happened to the portfolio during the account period if no trades had taken place. The Commission stated at page 183 of the decision:

> Had the customers, instead of placing their account with applicant [brokerage firm], simply continued holding the securities they originally owned, their account on the date it was closed would have shown an increased market value of about $2,663.

The *R. H. Johnson* case is identical to the issue in the *Neely* case regarding the relevance of how an account would have performed if defendants had not handled it.

The court in *Bethel Johnsen & Company,* 26 SEC 167 was faced with the same issue on two different customers' accounts and reached the same conclusion by holding as follows:

> Had the initial portfolios which had a market value of $54,008 on May 18, 1942 been left intact, however, their market value at the end of the period would have been $89,179.

In reviewing the trading in the second account, the court stated at page 168:

> Had the original portfolio not been disturbed, however, its value on May 7, 1945 would have been $70,933.

In addition, the case of *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 637 F.2d 77 (1980), permitted such testimony by holding at page 84, that "If no fraud had been committed the portfolio would have declined by this percentage anyway."

As the court stated in *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 327 (5th Cir. 1981):

> It is clear that awarding full "out of pocket" recovery — i.e., the difference between the original and final values of Miley's portfolio would be to assume, in effect, that none of Oppenheimer's transactions were legitimate, and to disregard the ordinary hazards of the stock market. (637 F.2d at 327.)

Shearson respectfully submits that this Petition should be granted and that Shearson is entitled to an order from this court reversing the judgments of the Ninth Circuit and the trial court and awarding to Shearson an offset for all losses which were caused by market forces rather than the acts or omissions of Shearson.

**B. The Award of Punitive Damages Is Improper Insofar as (1) It Is Based Upon an Inflated Compensatory Award as Is Set Forth Above; and (2) It Constitutes an Abuse of Discretion in Awarding Punitive Damages Well in Excess of the Three-to-One Ratio Established by the Fifth Circuit in Miley v. Oppenheimer & Co.**

The need for relief from this Court as a result of the failure of the courts below to consider market forces in calculating the size of the award has been set forth above. As to punitive damages relating to this point, it is sufficient to note that the error or prejudice is compounded or magnified substantially when that improper compensatory award is used as a basis for establishing a related punitive damage award.

This Court's intervention is necessary, however, for yet another reason. Examination of the law regarding punitive damage awards in business tort cases reveals that the area is almost without judicial precedent or guideline. Except for the Fifth Circuit delineation of a 3:1 guideline in *Miley v. Oppenheimer & Co.*, there is little authority upon which to base such an award. Certain courts, cited by plaintiffs, such as the California court of appeal in *Wetherbee v. United Insurance Company of America*, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971), have held that no standard or guideline can be stated with regard to the ratio between punitive and compensatory damages. Shearson submits that in this expanding area of litigation where the size and nature of verdicts rendered continue to accelerate, some special rule or guideline should be established for regulating the award of punitive damages in business tort litigation, especially in those cases which are based upon securities violations and have their foundation in the Securities Exchange Act of 1934 for which awards of punitive damages are not even allowed (15 U.S.C. 78bb).

Shearson submits that the jury abused its discretion in this case by awarding punitive damages in excess of a 3:1 ratio of punitive to actual damages. In the recent case of *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981) the Court of Appeals analyzed an award of punitive damages in a securities fraud case of $100,000 as compared to the $54,000 compensatory damages award (2:1 ratio). The court, in upholding the award, stated at page 331:

> Although we do not decide what amount of punitive damages, if any, should be awarded in every intentional, business tort case, we feel that a formula of punitive damages equal to three times compensatory damages is a fairly good standard against which to assess whether a jury abused its discretion. While there is nothing magical about the three-times-compensatory-damage formula, many courts which have weighed the kind of factors which comprise the Texas four-part test in awarding punitive damages for intentional big business torts, have selected that figure. *See, e.g., Palmer Coal & Rock Co. v. Gulf Oil Co.*, 524 F.2d 884, 887 (10th Cir. 1975), *cert. denied*, 424 U.S. 969, 96 S.Ct. 1466, 47 L.Ed. 2d 736 (1976) (affirming award of $1,500,000 punitive damages in fraud case with $500,000 compensatory damages); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (9th Cir. 1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1115, 51 L.Ed. 2d 544 (1977) (lowering punitive damages in business fraud case to $35,000 where average compensatory damage was $12,000); *Malandris v. Merrill, Lynch, Pierce, Fenner & Smith*, 03 F.2d 1152 (1983) (reducing $3,000,000 punitive damages in investor fraud case to $1,000,000 where compensatory damages were $1,030,000).

Moreover, we are greatly impressed by one commentator's insightful analysis on this issue:

> .... [T]he only sure way of deterring such conduct in the future is to take the profit away from the wrongdoers and slap on an additional amount as punitive damages: an award equal to treble damages would be fair, reasonable and well within the public interest.

In determining the reasonableness of the amount of punitive damages the relevant criteria include, according to the California court of appeal in *Rosener v. Sears Roebuck & Co.*, 110 Cal. App. 3d 740 (1980):

> (1) the particular nature of defendant's acts in light of the whole record;
>
> (2) the amount of defendant's wealth; and
>
> (3) the relationship of compensatory damages awarded compared to the punitive damages.

When the entire record of the instant proceeding is reviewed, the reasonable relationship between compensatory and punitive damages is found to be absent. This is especially true as to defendant Shearson in view of the nature of its acts which were shown to be at best a failure to adequately supervise defendant Albertson's selection of stocks. If the appellate court agrees that under the evidence the maximum compensatory damages should only be $11,706, then the award of $110,000 in punitive damages becomes even more unreasonable.

## VI.

## CONCLUSION.

For the reasons set forth above, Petitioners respectfully request that this Petition for Certiorari be granted and that Petitioners be allowed to present further legal arguments to this Court in support of their contentions that the compensatory and punitive damage award were incorrect and excessive as a matter of law.

Dated: September . , 1984

Respectfully submitted,

MICHAEL M. GLESS
ROBERT D. FEIGHNER
Members of KEESAL, YOUNG & LOGAN

*Attorneys for Shearson/ American Express Inc. and Jason Albertson*

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

Charles E. Neely, et al.,
Plaintiffs/Appellees,

v.

Shearson/American Express Inc.
and Jason Albertson,
Defendants/Appellants.

Appeal from the United States District Court
for the District of Arizona at Phoenix
Honorable Carl A. Muecke, District Judge, Presiding
Argued and Submitted April 13, 1984

No. 83-2373
(DC# CIV-82-776-PHX-CAM)
MEMORANDUM*

[Filed: July 11, 1984]
Before WISDOM**, ANDERSON, and SCHROEDER,
Circuit Judges.

Charles Neely and his wife, Jo Marie DiMaggio, brought this action against Shearson/American Express, Inc. and Jason Albertson alleging violations of section 10b of the Securities Exchange Act of 1934 and rule 10b-5, breach of fiduciary duty, and negligence in connection with the defendants management of the plaintiffs' securities portfolio.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**Senior Circuit Judge of the Court of Appeals for the Fifth Circuit, sitting by designation.

The jury awarded the plaintiffs $21,959 in compensatory damages and $110,000 in punitive damages. The defendants appeal.

On appeal, Albertson and Shearson contend that the trial court erred in excluding evidence of the performance of the plaintiffs' original portfolio during the relevant period. They also maintain that a new trial is required, because the district judge erroneously dismissed a regular juror instead of the alternate juror at the close of the trial. Finally, the defendants contest the damage award on three grounds. They contend that the amount of the compensatory award was excessive as a matter of law. They maintain that the evidence did not sustain an award of punitive damages. Alternatively, they contend that the amount of the punitive award was excessive as a matter of law, because the ratio of compensatory-to-punitive damages was greater than three-to-one.

These contentions are meritless and can be disposed of summarily. We affirm the jury verdict for the plaintiffs.

**First**, the defendants have not shown that the trial judge abused his discretion in excluding the evidence regarding the performance of the plaintiffs' original portfolio. Neely and DiMaggio entered into an agreement with the defendants to manage their portfolio. By entering into this agreement, Albertson and Shearson assumed a fiduciary duty to the plaintiffs. *See, e.g.*, Mihara v. Dean Witter & Co., 619 F.2d 814, 825 (9th Cir. 1980); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38 (2nd Cir. 1978); Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222, 249 (1968). Evidence that the plaintiffs would have fared no better without the defendants' assistance is not relevant to the plaintiff's claim of mismanagement. *See*

Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981). The district court did not abuse its discretion in excluding the evidence.

**Second**, the trial court's erroneous dismissal of a regular juror, rather than an alternate juror, does not warrant a new trial. *See* United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964). Under rule 47(b) of the Federal Rules of Civil Procedure, alternate jurors must possess the same qualifications as regular jurors. The defendants have not alleged that the alternate juror was unqualified or that they were prejudiced by the trial judge's error. Nor did they object at trial. We find in these circumstances that the district judge did not commit reversible error in seating a qualified, alternate juror who had been present and attentive during the entire proceedings.

**Third**, the amount of compensatory damages awarded by the jury was not excessive as a matter of law. The award was consistent with a finding of breach of fiduciary duty. The trial judge instructed the jury "to award [the] plaintiffs damages equal to the loss in portfolio value, including any excessive commissions, [that] resulted from [the defendants] breach of duty". Record, vol. 7, at 114. He also instructed the jury on the calculation of the loss in portfolio value, stating that "[t]he amount of damage is arrived at by taking the value of the original portfolio, adjust[ing] that sum by the percentage change in an appropriate index . . . between the date the account was opened and the date that it was closed, deduct[ing] the funds that the plaintiffs withdrew and then deduct[ing] the [closing] value of the portfolio". *Id.* at 111. The jury's award of $21,959 is consistent with this instruction.

**Fourth**, the award of punitive damages was proper. California law permits the award of punitive damages when the defendant's conduct is oppressive, fraudulent, or malicious. Cal. Civ. Code § 3294 (Deering 1983). Under California law, the issue of punitive damages can be submitted to the jury based on evidence that a broker engaged in excessive trading in a client's account. *Mihara*, 619 F.2d at 825-26 (9th Cir. 1980). *Accord* Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981) (applying Texas law). There was sufficient evidence of churning in this case for the jury to award punitive damages. The defendants' argument that any award of punitive damages was improper must be rejected.

Nor was the amount of the punitive damage award excessive. California law does not impose a fixed ratio of compensatory-to-punitive damages. *See* Wetherbee v. United Insurance Company of America, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971), upholding a punitive damage award of $200,000 based on a compensatory award of $1,050. Finding that the award is lawful under California law, this Court's discretion to overturn the jury's award is limited. We will overturn an award only if it appears that the jury was influenced by passion or prejudice. Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1983). We find no evidence of improper influence in this case. We, therefore, uphold the jury's award.

The judgment of the district court is AFFIRMED.

United States District Court, District of Arizona

Charles E. Neely and Jo Marie DiMaggio,
husband and wife,
Plaintiffs,

vs

Shearson/American Express, Inc., a Delaware corporation;
Jason Albertson,
Defendants.

No. CIV-82-776-PHX-CAM

JUDGMENT

The above entitled and numbered cause having come on regularly for trial before a jury on June 21, 1983, June 22, 1983, June 23, 1983, June 24, 1983, June 29, 1983 and June 30, 1983, and the plaintiffs being present in person and with their attorney, Albert M. Goldberg, and the defendants being present with their attorney, Michael M. Gless of Keesal, Young & Logan, and both parties having announced ready and the plaintiffs having introduced evidence in support of their complaint and the defendants having introduced evidence in opposition thereto, and the matter having been submitted to the jury for their determination, and the jury having returned a verdict in favor of the plaintiffs in which they granted compensatory damages to the plaintiffs in the amount of $21,959.74, and did also grant punitive damages in favor of the plaintiffs as against defendant Jason Albertson in the amount of $10,000.00, and also granted punitive damages in favor of the plaintiffs as against defendant Shearson/American Express, Inc. in the amount of $100,000.00.

NOW, THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded judgment against the defendants Shearson/American Express, Inc., and Jason Albertson, jointly and severally, in the amount of TWENTY ONE THOUSAND NINE HUNDRED FIFTY-NINE and 74/100 ($21,959.74) DOLLARS, together with interest thereon from December 10, 1981, to the date of this judgment at the rate of ten (10%) percent per annum, and interest on the total amount of the foregoing shall accrue from the date of this judgment at the rate of 10.25 percent per annum; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded judgment against the defendant Shearson/American Express, Inc., in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with interest thereon from the date of this judgment at the rate of 10.25 percent per annum; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded judgment against the defendant Jason Albertson in the sum of TEN THOUSAND ($10,000.00) DOLLARS, together with interest thereon from the date of this judgment at the rate of 10.25 percent per annum; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be awarded costs herein as against the defendants, jointly and severally.

DONE IN OPEN COURT this 15 day of July, 1983.

C. A. MUECKE, Chief Judge

The undersigned has read the foregoing Judgment, and approves the same as to form and content.

DATED this 6 day of July, 1983.

KEESAL, YOUNG & LOGAN
By MICHAEL M. GLESS
*Attorneys for Defendants.*